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No. 95-1218

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

ALLIGATOR FARMS, INC.,

Petitioner,

vs.

DAVID GRONER and DAVID GRONER & ASSOCIATES, A P.L.C.,

Respondents.

-CONSOLIDATED WITH-

RAYMOND JOHN O'BRIEN, III,

Petitioner,

vs.

DAVID W. GRONER,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeal Third Circuit State Of Louisiana

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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RESPONDENT'S STATEMENT OF THE CASE

In 1990, Raymond John O'Brien, III, who owned Alligator Farms, Inc., became interested in expanding the ongoing operations of the business. (Tr. page 79) As part of the expansion, in November, 1990, David W. Groner acquired shares in the Alligator Farms, Inc. venture. (Tr. page 79, and Exhibit D-1 located at Tr. page 53). Alligator Farms, Inc. was in need of additional capital, therefore, in exchange for Mr. Groner's shares of stocks, he agreed to secure financing for the venture as well as paying $15,000 out front for the stock. (Tr. page 84; Exhibit D-1; Tr. pages 53-54).

Mr. Groner thereafter filed a loan application with First South Production Credit Association. (Tr. pages 80, 85.) On February 4, 1991, Cecil Corbello, of First South Production Credit Association sent a letter to the corporate address of Alligator Farms, Inc. in which he indicated that the application for financing was denied. (Exhibit D-2 at Tr. page 56.) Mr. Groner then entered into discussions with Hibernia National Bank regarding obtaining financing for the expansion of Alligator Farms, Inc. (Tr. page 86). After entering into discussions with Hibernia, Alligator Farms, Inc. informed First Production Credit Association that it was no longer interested in obtaining a loan from its institution. (Tr. pages 101, 120). Alligator Farms, through the testimony of Raymond O'Brien, contends that Mr. Groner and Mr. O'Brien believed that they had a verbal commitment from First South Production Credit Association for a $1,000,000 loan. (Tr. pages 105, 125) Admittedly, however, Alligator Farms and Raymond O'Brien agree that there was no written agreement with First South Production Credit

Association and that it was not a viable source of the loan. (Pet. page 7, par. 2; Tr. page 120).

In the meantime, Hibernia National Bank had indicated that it was willing to make the loan if the evaluation of O'Brien's assets met their criteria for collateral. (Tr. pages 130, 131.) Towards that end, Hibernia National Bank hired an appraisal company, D.O.R., to evaluate O'Brien's oil and gas properties. (Tr. page 119.) Pending the appraisal, funds in the amount of $400,000.00 were advanced to O'Brien and Alligator Farms, Inc., based on O'Brien's ability to repay that money out of his personal income. (Tr. page 108, Exhibit D-4 at Tr. page 59).

On July 5, 1991, John M. Madison, Jr., O'Brien's oil and gas attorney, sent a letter to Hibernia National Bank outlining O'Brien's understanding of the status of the loan. (Exhibit D-3 at Tr. page 57). Specifically, the understanding was that Hibernia National Bank had agreed to loan Alligator Farms $1.5 million. Madison further stated in his letter that it was understood that the bank's commitment was conditioned on receipt of satisfactory title examination of O'Brien's interest in Lake Arthur mineral rights. Madison explained that O'Brien had received approximately $350,000.00 at that time, but the remainder of the loan had not been funded. Madison further related that upon O'Brien's inquiry to the bank, he had been told that the reports evaluating the mineral interests had been discontinued. Consequently, because of this, O'Brien was extremely concerned about the situation because it could prove "calamitous" and "disastrous" to Alligator Farms, Inc. (Exhibit D-3 at Tr. pages 57, 58).

In response thereto, on July 11, 1991, Hibernia National Bank sent a letter to Mr. Madison, and copied O'Brien, specifically stating, "we do not have nor have ever made either a verbal or written commitment to John O'Brien or his company, Alligator Farms, Inc. for any amount – certainly not $1.5 million." (Tr. page 59, Exhibit D-4). Hibernia's letter further stated that on three different occasions monies had been advanced on the strength of O'Brien's personal income, pending an evaluation completed on his oil and gas interests. (Tr. page 59, Exhibit D-4).

When the appraisal of the oil and gas interests came in, it was insufficient to support the loan. (Tr. pages 102, 103). This report was rendered long before the institution of the bankruptcy proceedings, and put Mr. O'Brien on notice that Hibernia was not going to loan the money based on this appraisal. (Tr. page 103).

On or around November, 1991, David W. Groner resigned his position as a Board of Directors member and officer of the corporation, Alligator Farms, Inc. (Tr. page 124).

Some time thereafter, Alligator Farms, Inc. and Raymond John O'Brien, III, personally, filed for bankruptcy protection. (Tr. page 109). The bankruptcy filing listed a claim against Hibernia National Bank for breach of a lending contract. (Tr. page 109). On or around November, 1992, the judge in the bankruptcy proceedings dismissed the claims against Hibernia due to lack of a written loan commitment. (Tr. pages 110, 111).

On July 21, 1993, Raymond John O'Brien, III and Alligator Farms, Inc. both filed petitions for damages

against David W. Groner alleging the existence of an attorney/client relationship between David W. Groner and Raymond John O'Brien, III and Alligator Farms, Inc. (Tr. pages 2-12). Specifically, they allege that the fiduciary duty was breached by Mr. Groner's failure to obtain the total funding contemplated resulting in the destruction of the corporation and its bankruptcy. (Tr. page 9, Plaintiffs-Appellants' Petition, paragraph 22).

Thereafter, David W. Groner filed an Answer and a Peremptory Exception for Prescription. For the purposes of the hearing on the Exception of Prescription and for this appeal, *only*, it was admitted that an attorney/client relationship existed between Raymond John O'Brien, III and Alligator Farms, Inc. and David W. Groner. (Tr. page 82).

ARGUMENT

Respondents oppose the Petition for Writ of Certiorari on two grounds: (1) the petitioner's failure to properly present either of the federal questions in the state courts deprives this court of jurisdiction; and (2) the lower courts' interpretation of L.A.-R.S. 9:5605 does not raise either due process or equal protection constitutional concerns.

I. Petitioner's failure to properly present either of the federal questions in the state courts deprives this court of jurisdiction.

This court's certiorari jurisdiction over decisions from state courts derives from 28 USC § 1257 which provides:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the Untied States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

In *Yee v. City of Escondido, Cal.*, 112 S.Ct. 1522 (1992), this court held that where constitutional claims had not been addressed on the merits in the state courts, those claims would not be considered on a writ of certiorari. The facts of that case are set forth below.

John and Irene Yee owned the Friendly Hills and Sunset Mobile Home Parks, both of which are located in the city of Escondido. They filed suit, contending that a local rent control ordinance, when viewed against the backdrop of California's Mobile-home Residency Law, amounted to a physical occupation of their property entitling them to compensation. The Yees requested damages of six million dollars, a declaration that the rent control

ordinance was unconstitutional, and an injunction barring the ordinance's enforcement. *Id.* at pg. 1527. The Superior Court sustained the city's demurrer and dismissed the Yees' complaint.

The Court of Appeal affirmed, in an opinion primarily devoted to expressing the court's disagreement with the reasoning of *Hall v. City of Santa Barbara*, 833 F.2d 1270 (CA9 1987), cert. denied, 485 U.S. 940, 108 S.Ct. 1120, 99 L.Ed.2d 281 (1988), which had held that a similar mobile home rent control ordinance effected a physical taking under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982).

The California Supreme Court denied review. This court granted certiorari to resolve the conflict between the decision below and those of two of the federal Courts of Appeals.

In the Supreme Court, petitioners attempted to challenge the ordinance on two additional grounds, one of which was that the statute amounted to a denial of substantive due process and a regulatory taking. The court found that claim was not properly before it, because it was not properly raised or addressed below, stating as follows:

> "[11] The Yees did not include a due process claim in their complaint. Nor did petitioner raise a due process claim in the Court of Appeal. It was not until their petition for review in the California Supreme Court that petitioners finally raised a substantive due process claim. But the California Supreme Court denied discretionary review. Such a denial, as in this Court, expresses no view as to the merits. See *People v.*

Triggs, 8 Cal.3d 884, 890-891, 106 Cal.Rptr. 408, 412, 506 P.2d 232, 236 (1973). In short, petitioners did not raise a substantive due process claim in the state courts, and no state court has addressed such a claim.

In reviewing the judgments of state courts under the jurisdictional grant of 28 U.S.C. § 1257, the Court has, with very rare exceptions, refused to consider petitioners' claims that were not raised or addressed below. *Illinois v. Gates*, 462 U.S. 213, 218-220, 103 S.Ct. 2317, 2321-2323, 76 L.Ed.2d 527 (1983). While we have expressed inconsistent views as to whether this rule is jurisdictional or prudential in cases arising from state courts, see *ibid.*, we need not resolve the question here. (In cases arising from federal courts, the rule is prudential only. See, e.g., *Carlson v. Green*, 446 U.S. 14, 17, n. 2,100 S.Ct. 1468, 1470, n. 2, 64 L.Ed.2d 15 (1980).) Even if the rule were prudential, we would adhere to it in this case. Because petitioners did not raise their substantive due process claim below, and because the state courts did not address it, we will not consider it here. *Id.* at pg. 1531.

The procedural posture of the petitioner's constitutional issues in this case is the same as those in *Yee*, supra. That is, petitioner did not raise its constitutional claims either in its original petition for damages or at any time during the trial of this matter. There is no reference whatsoever, to a constitutional challenge in the trial court's reasons for ruling. (App. D). Nor were any errors based on constitutional challenges assigned in petitioner's appeal. (App. C). For the first time, in its original application for a writ of certiorari to the Louisiana

Supreme Court, petitioner challenged the constitutionality of the prescriptive statutes at issue in this case. The writ was denied without written reasons therefore. (App. B). Petitioner's application for reconsideration of those issues was also denied without written reasons therefore. (App. A).

As this court noted in *Yee*, supra, a denial of a writ, without reasons, expresses no opinion as to the merits of the constitutional issues. Since neither the trial court, the appellate court nor the Louisiana Supreme Court has considered the constitutionality of L.A.-R.S. 9:5605, this court should decline to consider the issue on a writ of certiorari. As there are no issues which are properly before this court for review, it is respectfully submitted that jurisdiction is lacking and the Petition for Writ of Certiorari should be denied.

II. The lower courts' interpretation of L.A.-R.S. 9:5605 does not raise either due process or equal protection constitutional concerns.

Rule 10 of the Supreme Court Rules provides that "[a] petition for a writ of certiorari will be granted only when there are special and important reasons therefor." Examples, which are not controlling, are given, indicating the character of reasons that will be considered. The section pertinent to this case provides that a writ may be considered:

> (c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be,

> settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

Petitioner contends that L.A.-R.S. 9:5605 violates the Equal Protection and Due Process Clauses of the United States Constitution. (Pet. pg. i).

A. Equal Protection

With respect to equal protection, petitioner argues that "the Louisiana Legislature has treated lawyer tortfeasors much more favorably than laymen tortfeasors". (Pet. pg. 12). Specifically, petitioner suggests that the attorney tortfeasor receives more favorable treatment than the layman tortfeasor because prescription on a cause of action against the former begins to run from the date of the act or omission, whereas prescription on a cause of action against the latter does not begin to run until injury or damage is sustained. (Pet. pgs. 12-14). Moreover, petitioner complains that the "legislation encourages attorneys to cover up any wrongdoings for a mere three year period wherafter they cannot be held liable for their actions under any scenario. A layman tortfeasor who covers up his actions for a period of three years will still be subject to a tort lawsuit upon discovery by the victim of the wrongdoing. Such base classifications are a violation per se of the Equal Protection Clause of the United States Constitution." (Pet. pg. 24).

The Louisiana Statute which is applicable to attorneys is L.A.-R.S. 9:5605 which provides as follows:

> (A) No action for damages against any attorney at law . . . shall be brought . . . unless

> filed . . . within one year from the date that the alleged act, omission, or neglect was discovered; however, even as to actions filed within one year from the date of such discovery, in all events such actions shall be filed at the latest within there years from the date of the alleged act, omissions, or neglect.
>
> (B) The provisions of this section are remedial and apply to all causes of action without regard to the date when the alleged act, omission, or neglect occurred. However, with respect to any alleged act, omission, or neglect occurring prior to September 7, 1990, actions must, in all events, be filed in a court of competent jurisdiction and proper venue on or before September 7, 1993, without regard to the date of discovery of the alleged act, omission, or neglect. The one year and three year periods of limitation provided in subsection a of this section are preemptive periods within the meaning of Civil Code Article 3458 and, in accordance with Civil Code Article 3461, may not be renounced, interrupted, or suspended.

The general prescriptive period for torts in Louisiana is found in La.-C.C.Art. 3492 which provides that:

> Delictual actions are subject to liberative prescription of one year. This prescription commences to run from the day the injury or damage is sustained. It does not run against minors or interdicts in actions involving permanent disability and brought pursuant to the Louisiana Products Liability Act or state law governing product liability actions in effect at the time of the injury or damage.

A showing that different persons are treated differently is not enough, without more, to show a denial of equal protection. *Griffin v. County School Bd. of Prince Edward County*, 84 S.Ct. 1226, 377 U.S. 218, 12 L.Ed.2d 256 (1964), motion granted, 84 S.Ct. 1627, 377 U.S. 950, 12 L.Ed.2d. 496.

L.A.-R.S. 9:5605 does not discriminate between victims of attorney malpractice. Equal Protection of the laws is not denied by a statute if all persons subject to it are treated alike under similar circumstances. *Currin v. Wallace*, 59 S.Ct. 379, 306 U.S. 1, 83 L.Ed. 441 (1939); *Reynolds v. Sims*, 84 S.Ct. 1362, 377 U.S. 533, 12 L.Ed.2d 506, *rehearing denied*, 85 S.Ct. 12, 13, 379 U.S. 870, 871, 13 L.Ed.2d. 76, 77 (1964). Therefore, the statute is not discriminatory on its face. Nor, since petitioner claims to be a victim of attorney malpractice, is the statute discriminatory in application. However, petitioner suggests that there is different treatment of victims of lay tortfeasors and victims of attorney malpractice, amounting to discrimination in violation of the Equal Protection Clause.

Respondent suggests that despite the difference in the language of the two statutes herein at issue, as Louisiana courts have interpreted these statutes, the Equal Protection Clause is not implicated. L.A.-R.S. 9:5605 provides that prescription commences to run at the date on which the act is discovered. La. Civ. Code art 3492 provides that prescription commences to run when injury or damage is sustained. However, in both instances, the court is really concerned with the date on which the plaintiff's discovery of his cause of action occurs. For instance, in most personal injury cases, the act and the damage generally occur simultaneously and as such, prescription beings to

run immediately. See e.g., *Christian v. Daniel Manufacturing Co.*, 279 So.2d 214 (La. App. 1993) (Action for damage for personal injuries sustained by plaintiff in a fall from a ladder provided by defendants for whom plaintiff was working began to run on date of fall); *Additon v. Chevron U.S.A., Inc.*, 526 So.2d 465 (La. App. 1st Cir. 1988), writ denied 532 So.2d 177, reconsideration denied 533 So.2d 7) (Prescription of personal injury action was not tolled until such time as plaintiff realized severity of back injury where plaintiff experienced pain and knew he had hurt his back immediately upon injuring it). Often, however, the damage may be the first notice that a plaintiff has of his cause of action. In these instances, courts deem actions timely filed if instituted within one year of the date of the discovery of damage and the cause thereof. See e.g., *Touchstone v. Land & Marine Applicators, Inc.*, 628 F. Supp. 1202 (E.D.La. 1986) (Louisiana one year prescription period governing claims against manufacturers and distributors of safety mask used by sandblasters and sand suppliers to recover for silicosis accrued when the symptoms were manifested, not necessarily when the disease was diagnosed); *Woessner v. Johns-Manville Sales Corp.*, 576 F.Supp. 596, affirmed, 757 F.2d, 634 (Where plaintiff knew as early as 1972 that he had been exposed to asbestos-containing products and that he had been diagnosed as having asbestosis, prescription on his cause of action against asbestos manufacturer commenced at that time, and thus, action which was instituted in 1982 was time barred under Louisiana law). In either case, the court looks to a common denominator, i.e. the date of discovery, to determine when prescription on a cause of action begins to run.

Likewise, prescription on an action against an attorney for malpractice begins to run from the date of discovery of the cause of action. In this respect, there is no different treatment, or discrimination, between victims of personal injury accidents and victims of legal malpractice.[1]

---

[1] Petitioner acknowledges that the date of discovery is the key issue in this case. (Pet. pg. 14, par. 2). Only petitioner argues that it did not discover the malpractice until August of 1992. (Pet. pg 14-15). It argues that the action against Respondent was filed within one year of "learning their attorney had breached his fiduciary duty." (Pet. pg. 28). Notably, however, petitioner's whole argument is that the trial court's factual findings were in error:

> [T]he July 11, 1991 letter did not end the negotiations between the bank and the petitioners. . . . This was the error the Trial judge made. He thought the July 11, 1991 letter made the bank's position perfectly clear once and for all. . . . (Pet. pg. 15-16).

These are not the facts. The court found that:

> [R]egardless of what may have happened before, the Hibernia National Bank, in . . . their letter of July 11th, 1991, which is Defendant's Exhibit Number 4 . . . makes it clear that it's the bank's position that they did not at that time and up to that time make either a verbal or written commitment to the plaintiffs for any amount. Now, Defendant's Exhibit Number 4 was copied to Mr. O'Brien, and there seems to be no question but that the plaintiffs were aware of this letter. (App. D, pg. 13a).

The appellate court affirmed these factual findings. (App. C, pgs. 9a-10a). Since review of a state court's factual findings is not appropriate on a writ of certiorari, petitioner has put forth "smoking mirrors", asserting non-existent constitutional issues.

Ironically, if there is a difference in treatment, the difference operates in *favor* of the victim of attorney malpractice, in which class the petitioner claims to be. The Louisiana legislature has granted victims of malpractice the right to proceed with suit upon discovery of the attorney's negligent act, whereas victims of lay tortfeasors must wait until damage is manifested with some degree of certainty. As such, petitioner has no standing to complain of an equal protection violation.

Petitioner also suggests that the application of a three year preemptive period to victims of attorney malpractice, but not to victims of lay tortfeasors, is a violation of equal protection. However, this portion of the statute has never been raised or in any way at issue in this case, and as such, the constitutionality of that portion of the statute, being separable, is not an issue before the court.

In any event, L.A.-R.S. 9:5605 passes constitutional muster. A legislative classification will not be set aside if any state of facts rationally justifying it is demonstrated or perceived by the courts. *U.S. v. Maryland Savings-Share Ins. Corp.* (1970), 91 S.Ct. 16, 400 U.S. 4, 27 L.Ed.2d 4. State laws are entitled to a presumption of validity against attack under the Equal Protection Clause. *Parham v. Hughes*, 99 S.Ct. 1742, 441 U.S. 347, 60 L.Ed. 269 (1979). Petitioner fairly admits that attorneys are not in a suspect class and that, therefore, a State may make classifications, i.e., attorney tortfeasors versus layman tortfeasors, so long as there is some reasonable basis in the law for doing so. (Pet., pg. 23).

This court has indicated that the primary purpose of statutes of limitations is to assure fairness to defendants.

Burnett v. New York Central Railroad Company, 380 U.S. 424, 428 (1965). Statutes of limitations:

> "[P]romote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them."

Id. (quoting *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 348-49 (1944)). "Moreover, the courts ought to be relieved of the burden of trying stale claims when a plaintiff has slept on his rights." *Burnett*, 380 U.S. at 428.

Louisiana's concept of liberative prescription is parallel to a statute of limitations. Like statutes of limitations, liberative prescription is a procedural bar to legal actions not timely instituted. La. Civ. Code art. 3492. Its roots are in considerations of social stability and procedural fairness. "[Liberative prescription] is socially useful in that it puts an end to litigation and terminates the uncertainty of the debtor." Comment, Revision of the Civil Code Provisions on Liberative Prescription, 60 Tul. L. Rev. 379, 380 (1985) (hereinafter "Comment"). "Commentators and courts agree that the potential injustice of liberative prescription – nonpayment of a debt justly owed – is outweighed by the greater evil of interminable liability." Id. Further:

> "In terms of social utility, prescription can be compared with the rules of res judicata. Their function is analogous. There comes a moment when it is necessary to say the last word, where the uncertainty of the law is more burdensome than injustice. Even if prescription seems to lead in some rare cases to results contrary to equity . . . it can easily be forgiven in exchange for the great services it renders to society. Without it there would be no security in transactions, no stability in private estate, no peace among individuals, no order in the state."

Comment, 60 Tul L. Rev. at 380-81 n.13 and n.14 (quoting G. Baudry-Lacantinerie & A. Tissier, Traite Theorique et Pratique Du Droit Civil n.29 (4th ed. La. State L. Inst. trns. 1972)).

The Louisiana legislature enacted 9:5605, and a number of other prescriptive statutes pertaining to various professions, such as for accountant malpractice (L.A.-R.S. 9:5604) and medical malpractice (L.A.-R.S. 9:5628) all of which similarly provide that prescription commences to run on the date of discovery of the malpractice, as well as having three year peremptive periods. The legislative intent behind the medical malpractice prescription statute has been recognized as being for the general benefit of the public in keeping insurance costs down *Whitnell v. Menville*, 525 So.2d 361, rev'd on other grounds, 540 So.2d 304 (La. App. 4th Cir. 1988). Likewise, legislative records indicate that similar concerns exist with respect to actions for accountant and attorney malpractice actions. (App. E).

The legislature's efforts to prevent staleness of actions, to lend finality to a defendant's liability exposure

and to keep concomitant insurance costs down all provide a reasonable basis for any disparity in treatment, however slight it may be, between the victims of attorney malpractice and those of lay tortfeasors. As such, petitioner has not presented an equal protection challenge worth review by this court.

B. Due Process

Petitioner also challenges L.A.-R.S. 9:5605 on due process grounds.

The only "vested" right which petitioner has is the one which was created by the 1990 enactment of L.A.-R.S. 9:5605. Petitioner was in no way deprived of this right. Petitioner argues that the commencement of prescription prior to manifestation of damage constitutes a denial of due process. However, the mere fact that L.A.-R.S. 9:5605 provides that prescription begins to run on a cause of action from the date of the act, even if damages have not been sustained, does not amount to a due process violation.

The law making body is the primary judge as to what is a reasonable time limitation for bringing of actions and courts will not inquire into the wisdom of legislative decisions establishing a period of limitation unless the time allowed is so manifestly insufficient as to amount to a denial of justice. *Caldwell v. Alabama Dry Dock and Shipbuilding Co.*, 161 F.2d 83 (5th Cir. 1947), certiorari denied, 68 S.Ct. 59, 60, 332 U.S. 759, 92 L.Ed. 345. Furthermore, and as previously stated, statutes of limitations serve an important function in preventing staleness of claims and have great social utility in promoting stability

of transactions and peace among citizens. It is well established that the imposition of a reasonable time period in which to exercise rights to file suit does not violate due process.

Petitioner also argues that the 1992 amendments to L.A.-R.S. 9:5605, adding paragraph (B), simultaneously created a vested right in Alligator Farms by eliminating the requirement that a malpractice plaintiff sustained damage before cause of action accrues, and then eliminating that right through the operation of the one year prescriptive period. (Pet. pg. 25).

This suggests that petitioner knew of the act complained of prior to September 7, 1990, but assumed non-retroactivity of L.A.-R.S. 9:5605. It further suggests that, by the time that the legislature informed petitioner that the statute would be retroactively applied, the three year peremptive period had run.

The facts do not support this argument. The court's finding was that the petitioner was, or should have been, aware of the wrongful act on July 11th, 1991. (App. C and D). Therefore, the act did not occur prior to September 7, 1990. Since the act did not occur prior to September 7, 1990, the 1992 amendments, adding paragraph (B) to L.A.-R.S. 9:5605, had absolutely no effect on petitioner's cause of action, either in the positive or negative. Simply put, according to the court's factual findings, L.A.-R.S. 9:5605 was already in effect at the time that petitioner's cause of action accrued. The 1992 amendments therefore did not create petitioner's cause of action. That was created in 1990. Furthermore, the 1992 amendments did not

operate to retroactively deprive petitioner of his cause of action.

In the event that petitioner contends that the portion of the 1992 amendments which explicitly state that the three year period its peremptive, rather than prescriptive, operated to deprive him of a right, again petitioner is inaccurate. The three year period did not come into play at all in this case because it had not run at the time that suit was filed.[2] Therefore, petitioner was "deprived" of no right, and certainly, in all events, was not deprived unfairly.

III. Conclusion

In conclusion, respondents object to the jurisdiction of this court over this matter on a writ of certiorari. The constitutional issues have not been properly raised before Louisiana Courts and those courts have not been given the opportunity to review the constitutionality of the statute currently being challenged. As such, there is no issue properly reviewable by this court on a writ of certiorari. For this reason the Petition for Writ of Certiorari should be denied.

Moreover, there are no constitutional issues being urged which are worthy of this court's review. L.A.-R.S.

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[2] Furthermore, this court has indicated that the type of "window" provided in paragraph (B) which gives a litigant ample opportunity to file suit on a cause of action that would otherwise be deemed prescribed meets due process requirements. *Wheeler v. Jackson*, 11 S.Ct. 76, 137 U.S. 245, 34 L.Ed. 659 (1890); *Saranac Land etc. v. Comptroller*, 20 S.Ct. 642, 177 U.S. 318, 44 L.Ed. 786 (1900).

9:5605 does not operate to deprive legal malpractice victims of equal protection of the laws in providing for the commencement of prescription on discovery of the act complained of. There is no discrimination, as all causes of action, for all torts, are deemed to be prescribed one year following the plaintiff's discovery of his cause of action. In any event, the Louisiana legislature has a reasonable basis upon which to base its classification.

Nor is there any merit in a due process challenge as the plaintiff in this cases was not unfairly deprived of a cause of action.

Respondents therefore respectfully urge this Court to deny the Petition for Writ of Certiorari.

VOORHIES & LABBÉ
(A Professional Law Corporation)

WILLIAM M. BASS (Bar #2839)
Post Office Box 3527
Lafayette, LA 70505-3527
Telephone No. (318) 232-9700

Attorneys for David W. Groner & David Groner & Assoc., A P.L.C.

APPENDICES

APPENDIX A – DENIAL OF RECONSIDERATION OF WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT DATED NOVEMBER 27, 1995

THE SUPREME COURT OF THE STATE OF LOUISIANA

NO. 95-C-1670

RAYMOND JOHN O'BRIEN, III

VERSUS

DAVID W. GRONER

C/W

ALLIGATOR FARMS, INC., ET AL

VERSUS

DAVID GRONER, ET AL

IN RE: Alligator Farms, Inc.; Plaintiff(s); Applying for Reconsideration of this Court's action dated October 27, 1995; Parish of Iberia, 16th Judicial District Court, Div. "A" Number 0781443; to the Court of Appeal, Third Circuit, Number CA94-1611, CA94-1612

November 27, 1995

Reconsideration denied. Judgment is res judicata.

CDK
PFC
WFM
JCW
HTL
BJJ
JPV

Supreme Court of Louisiana
November 27, 1995

s/illegible
Clerk of Court
For the Court

APPENDIX B – DENIAL OF WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT DATED OCTOBER 27, 1995

THE SUPREME COURT OF THE STATE OF LOUISIANA

NO. 95-C-1670

RAYMOND JOHN O'BRIEN, III

VERSUS

DAVID W. GRONER

C/W

ALLIGATOR FARMS, INC., ET AL

VERSUS

DAVID GRONER, ET AL

IN RE: Alligator Farms, Inc.; Plaintiff(s); Applying for Writ of Certiorari and/or Review; Parish of Iberia, 16th Judicial District Court Div. "A" Number 078081, 178143; to the Court of Appeal, Third Circuit, Number CA94-1611, CA94-1612

October 27, 1995

Denied.

BJJ
PFC
WFM
JCW

LEMMON, J. would grant the writ.
KIMBALL, J. would grant the writ.
VICTORY, J. would grant the writ.

Supreme Court of Louisiana
October 27, 1995

s/illegible
Clerk of Court
For the Court

APPENDIX C - DECISION OF THE LOUISIANA THIRD CIRCUIT COURT OF APPEAL DENIED MAY 31, 1995

NOT FOR PUBLICATION

NUMBER 94-1611

COURT OF APPEAL, THIRD CIRCUIT
STATE OF LOUISIANA

RAYMOND JOHN O'BRIEN, III

Plaintiff-Appellant

VERSUS

DAVID W. GRONER

Defendant-Appellee

CONSOLIDATED WITH NUMBER 94-1612

ALLIGATOR FARMS, INC., ET AL

Plaintiffs-Appellants

VERSUS

DAVID GRONER, ET AL

Defendants-Appellees

On Appeal from the Sixteenth Judicial District for the Parish of Iberia, State of Louisiana; Honorable C. Thomas Bienvenu, Jr., Judge, Presiding.

BEFORE: LABORDE, WOODARD and AMY, Judges.

LABORDE, Judge.

Plaintiffs filed suit against defendant for legal malpractice. Defendant then filed an exception of prescription, which the trial court granted, dismissing plaintiffs' action. Plaintiffs appeal. We affirm, finding no error in the trial court's judgment.

FACTS

Plaintiff, Raymond John O'Brien, was the owner of Alligator Farms, Inc., a corporation he formed in 1989. Defendant, David Groner, an attorney was hired by the corporation to assist in preparing a financial package and business proposal for potential investors and lending institutions. Groner agreed to accept a percentage of the company's profits instead of monetary payment for his services. In the agreement in which Groner became a shareholder, dated November 11, 1990, the parties listed Groner's responsibilities as follows:

> Responsibility for obtaining all capital necessary to finance the operations of Alligator Farms, Inc., including meeting all operating expenses, and financing for capital improvements necessary to fully develop the operations of Alligator Farms, Inc. which are outlined in Exhibit "1", however reasonable time is allowed for the finances to be obtained.

Groner was then named as an officer and shareholder of the corporation, and he continued to represent the corporation for the purpose of obtaining financing. Groner approached First Production Credit Corporation for financing $1.5 million to Alligator Farms. However, during negotiations with First Production, Groner contacted Hibernia Bank in Lafayette to see if he could get more

favorable loan terms for the company. Hibernia apparently agreed to loan Alligator Farms the same amount, with more favorable terms than First Production, and informed Alligator Farms that it could made [sic] the funds available immediately. After Alligator Farms began negotiations with Hibernia, it informed First Production that it was no longer interested in obtaining a loan.

Hibernia began evaluating plaintiffs loan application, with O'Brien's assets as collateral. Hibernia advanced $100,000 to Alligator Farms while it was still investigating Alligator Farms' collateral. O'Brien then signed a collateral mortgage on his personal property to Hibernia for $1.5 million, to secure the financing from Hibernia. Hibernia subsequently advanced another $250,000 even though it had not completed a title opinion to O'Brien oil and gas properties. Soon afterwards, Hibernia informed Alligator Farms that funding would be suspended until the bank could obtain an independent evaluation of the properties.

O'Brien then asked one of his oil and gas attorneys, John Madison, to write a letter to Hibernia in support of his loan. On July 5, 1991, Madison wrote a letter to Hibernia outlining O'Brien's understanding of the status of the loan. By letter dated July 11, 1991, Harold Turner of Hibernia responded that Hibernia had not made a verbal or written commitment to O'Brien or Alligator Farms for any amount. He further stated that Hibernia had advanced funds to be company based only on O'Brien's personal income and would not be advancing additional funds until completion of the evaluation of his oil and gas properties. A copy of this letter was also sent to O'Brien.

However, after this letter was sent, Hibernia did advance Alligator Farms another $50,000, for a total of $400,000.

The appraisal concluded that O'Brien's properties were insufficient to support the loan. Hibernia subsequently refused to advance Alligator Farms any more funds. Because of this failure of Hibernia to loan the money Alligator Farms believed was promised, Alligator Farms was unable to meet its other commitments. Both O'Brien and Alligator Farms were forced to file for bankruptcy protection.

In August 1991, during bankruptcy proceedings, plaintiffs discovered that there was no written commitment from Hibernia to make a loan for $1.5 million. Yet Groner had represented to plaintiffs that a written loan commitment did exist, obligating Hibernia to loan the entire $1.5 million. In November of 1992, the bankruptcy judge concluded that plaintiffs had no cause of action against Hibernia because they had no written loan commitment. Plaintiffs claim they did not know there was no legal basis for a cause of action against Hibernia until the bankruptcy judge dismissed their claim.

Suit was filed by Raymond John O'Brien against David Groner on July 21, 1993. Another suit was filed against Groner on August 3, 1993, by the trustee in bankruptcy for Alligator Farms. Defendant subsequently filed a peremptory exception of prescription on December 8, 1993. Hearing on the exception was held on July 3, 1994. At that time, the trial judge granted defendant's motion to consolidate the two cases. The trial court granted

defendant's exception of prescription, dismissing plaintiffs claims against Groner. Plaintiff O'Brien appeals, alleging three assignments of error:

> 1. The trial judge erred in finding that Raymond John O'Brien, III had notice which caused prescription to run against his cause of action more than one year before filing his Petition for Damages.
>
> 2. The trial judge erred in finding that Raymond John O'Brien, III has sustained damages more than one year before filing his Petition for Damages.
>
> 3. The trial judge erred in dismissing the petition of Raymond John O'Brien, III in its entirety, as Raymond John O'Brien III alleged several causes of action, i.e., failure of Groner to obtain a written commitment from the lender, failure to obtain an independent evaluation of O'Brien's oil and gas properties, and representing both the corporation and O'Brien individually, to the detriment of O'Brien.

Alligator Farms also appeals, alleging two assignments of error:

> 1. The trial judge erred in finding that Alligator Farms, Inc. had notice which caused prescription to run against its cause of action more than one year before filing its Petition for Damages.
>
> 2. The trial judge erred in finding that Alligator Farms, Inc. had sustained damages more than one year before filing its Petition for Damages.

PRESCRIPTION

The trial court found that plaintiffs action had prescribed. In his reasons for judgment, the trial court stated as follows:

> The statute that is controlling for purposes of these exceptions is Section 5605 of Title 9 of the Revised Statutes. And for our purposes here, we are talking about a cause of action for legal malpractice and an exception of prescription to that cause of action based on the one-year prescriptive period provided by Paragraph "A" of the section that I just mentioned. And regardless of the doctrine of contra non valentem, the statute is clear that there is a one-year prescriptive period, either requiring that the suit be brought within one year from the date of the alleged act or within one year form [sic] the date that the alleged act is discovered or should have been discovered by the plaintiffs.
>
> The alleged act, as I – as I understand, regardless of whether – of when the damages may have been actually sustained, was the act of Mr. Groner in not obtaining a written commitment for a $1.2 million loan that he had secured; in other words, that he had received a commitment for that amount but had not taken the appropriate legal step to get it in writing, which he should have prudently done as an attorney. That's the cause of action, I understand, against him. That's the – the act complained of. And the question is: when should that act or omission have been discovered by the plaintiffs?
>
> Well, it seems to me that, regardless of what may have happened before, the Hibernia National Bank, in response – by letter of July

5th, 1991, in response to Mr. Madison's letter to them of July – I'm sorry – their letter of July 11th, 1991, which is Defendant's Exhibit Number 4, in response to Mr. Madison's letter to the bank of July 5th, 1991, Defendant's Exhibit Number 3, makes it clear that it's the bank's position that they did not at that time and up to that time make either a verbal or written commitment to the plaintiffs for any amount. Now, Defendant's Exhibit Number 4 was copied to Mr. O'Brien, and there seems to be no question but that the plaintiffs were aware of this letter.

I don't see any evidence of anything happening after that that should have caused the plaintiffs to reasonably believe that the bank had made a commitment to them, a firm commitment to them for – for any amount, except what they later loaned, $50,000.00, and certainly not in the amount of $1.2 million. If the bank made no commitment, either verbally or in writing, it should not have come as a surprise in August of '92 to find that out upon examination of the bank's documents; and it should not have been a surprise in November of 1992 when the bankruptcy judge announced that he could not give any more credence to the plaintiff's claim against Hibernia because there was not in existence a written letter of commitment. I don't see what could have happened between July 5th, 1991 – July 11th, 1991 and November of 1992 to make the plaintiffs reasonably believe that the desired commitment was thee [sic], either verbally or in writing. I don't doubt that Mr. O'Brien believed it, but it becomes a question under the statute of reasonableness. Should he have believed it? I think then that sufficient time elapsed for the filing of the action, which is one

> year from the date of the act or when the plaintiffs should have discovered the act. It would seek [sic] to me that the exceptions of prescription should be sustained.

We agree with the trial court's conclusions. Under La. R.S. 9:5605, prescription runs from the time of the act or omission, not from the time of the injury. Succession of Hellmers, 93-2386, 93-2387, 93-1883, 93-2073 (La. App. 4 Cir. 5/26/94); 637 So.2d 1302. Thus, the trial court properly sustained the defendant's exception of prescription.

DECREE

The judgment of the trial court is affirmed. Costs assessed to plaintiffs-appellants, Raymond John O'Brien and Alligator Farms, Inc.

AFFIRMED.

APPENDIX D – JUDGMENT AND WRITTEN REASONS FOR JUDGMENT FROM THE SIXTEENTH JUDICIAL DISTRICT COURT, STATE OF LOUISIANA

16TH JUDICIAL DISTRICT COURT

DOCKET NUMBER: 78081-A

IBERIA PARISH, LOUISIANA

RAYMOND JOHN O'BRIEN

VERSUS

DAVID W. GRONER

CONSOLIDATED WITH

16TH JUDICIAL DISTRICT COURT

DOCKET NUMBER: 78143-A

IBERIA PARISH, LOUISIANA

ALLIGATOR FARMS, INC. and
RAYMOND JOHN O'BRIEN, III

VERSUS

DAVID GRONER and
DAVID GRONER & ASSOCIATES, A P.L.C.

JUDGMENT

This matter came for hearing before this Honorable Court on June 3, 1994 on an Exception of Prescription filed by defendants, DAVID GRONER and DAVID GRONER & ASSOCIATES, A P.L.C.;

Present at the hearing were:

1) Leon J. Minvielle, III, counsel for RAYMOND JOHN O'BRIEN;

2) Milo A. Nickel, Jr., counsel for ALLIGATOR FARMS, INC. and RAYMOND JOHN O'BRIEN, III; and

3) William M. Bass, counsel for DAVID GRONER and DAVID GRONER & ASSOCIATES, A P.L.C.

After considering the law, evidence, memorandum and arguments of counsel, together with the pleadings, testimony, and depositions it is the Court's Judgment that:

The Exception of Prescription filed on behalf of DAVID GRONER and DAVID GRONER & ASSOCIATES, A P.L.C. is hereby sustained with Judgment rendered in favor of DAVID GRONER and DAVID GRONER & ASSOCIATES, A P.L.C. and against plaintiffs, RAYMOND JOHN O'BRIEN, III and ALLIGATOR FARMS, INC., with the costs of this matter to be shared by plaintiffs, RAYMOND JOHN O'BRIEN, III and ALLIGATOR FARMS, INC.

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of DAVID GRONER and DAVID GRONER & ASSOCIATES, A P.L.C. and against RAYMOND JOHN O'BRIEN, III and ALLIGATOR FARMS, INC., dismissing plaintiffs' demands against DAVID GRONER and DAVID GRONER & ASSOCIATES, A P.L.C., with prejudice at plaintiffs' costs.

JUDGMENT RENDERED, READ AND SIGNED on this 25th day of August, 1994 at New Iberia, Louisiana.

s/C. Thomas Bienvienu, Jr.
HONORABLE C. THOMAS BIENVIENU, JR.
16th Judicial District Judge

[73] REASONS FOR RULING

BY THE COURT:

Okay. The statute that is controlling for purposes of these exceptions if Section 5605 of Title 9 of the Revised Statutes. And for our purposes here, we are talking about a cause of action for legal malpractice and an exception of prescription to that cause of action based on the one-year prescriptive period provided by Paragraph "A" of the section that I just mentioned. And regardless of the doctrine of contra non valentem, the statute is clear that there is a one-year prescriptive period, either requiring that the suit be brought within one year from the date of the the [sic] alleged act or within one year from the date that the alleged act is discovered or should have been discovered by the plaintiffs.

The alleged act, as I – as I understand, regardless of whether – of when the damages may have been actually sustained, was the act of Mr. Groner in not obtaining a written commitment for a $1.2 million loan that he had secured; in other words, that he had received a commitment for that amount but had not taken the appropriate legal step to get it in writing, which he should have prudently done as an attorney. That's the cause of action,

I understand, against him. That's the – the act complained of. And the question is: when should that act or omission have been discovered by the plaintiffs?

[74] Well, it seems to me that, regardless of what may have happened before, the Hibernia National Bank, in response – by letter of July 5th, 1991, in response to Mr. Madison's letter to them of July – I'm sorry – their letter of July 11th, 1991, which is Defendant's Exhibit Number 4, in response to Mr. Madison's letter to the bank of July 5th, 1991, Defendant's Exhibit Number 3, makes it clear that it's the bank's position that they did not at that time and up to that time make either a verbal or written commitment to the plaintiffs for any amount. Now, Defendant's Exhibit Number 4 was copied to Mr. O'Brien, and there seems to be no question but that the plaintiffs were aware of this letter.

I don't see any evidence of anything happening after that that should have caused the plaintiffs to reasonably believe that the bank had made a commitment to them, a firm commitment to them for – for any amount, except what they later loaned, $50,000.00, and certainly not in the amount of $1.2 million. If the bank made no commitment, either verbally or in writing, it should not have come as a surprise in August of '92 to find that out upon examination of the bank's documents; and it should not have been a surprise in November of 1992 when the bankruptcy judge announced that he could not give any more credence to the plaintiff's claim against Hibernia because there was not in existence a written letter of commitment. I don't see what could have happened between July 5th, 1991 – July 11th, 1991 and November of 1992 to make the plaintiffs reasonably believe that the

desired commitment was thee [sic], either verbally or in writing. I don't doubt that Mr. O'Brien believed it, but it becomes a question under the statute of reasonableness. Should he have believed it? I think then that sufficient time elapsed for the filing of the action, which is one year from the date of the act or when the plaintiffs should have discovered the act. It would seek [sic] to me that the exceptions of prescription should be sustained.

BY MR. NICKEL:

May I add one point for the record, your Honor?

BY THE COURT:

Yes sir.

BY MR. NICKEL:

For the record, the cases that are cited by both Mr. Minvielle and myself in the briefs state that a plaintiff cannot maintain a cause of action and in fact a cause of action is premature until an ascertainable damage has been suffered with certainty.

Now, our position in this case is that Mr. O'Brien's damage was the loss of his cause of action against Hibernia, which occurred in November when the court did rule.

We – there's no dispute that Hibernia wrote a letter that said, "It's our position there's no commitment." There's also no dispute as between the parties that both sides believed that prior to that letter they had a written commitment. And [76] had they had one, they would have had a valid cause of action against Mr. O'Brien.

Mr. O'Brien could not have sued – had no reason – neither party had a reason to sue Hibernia after those letters were written because, as Mr. O'Brien has testified, they did fund additional money after those letters; there was no damage.

The issue becomes: when can he file suit? Even with discovery, even with the act, a cause of action does not exist without damages. The position of all parties in this case – of both plaintiffs is: there was no damage until Mr. O'Brien lost his cause of action against Hibernia Bank. And that occurred in November of 1992.

BY THE COURT:

Well, I don't know. I can let Mr. Bass respond if he wants. You want?

BY MR. BASS:

Your Honor, those comments by counsel were not appropriate. I think the Act is very clear with respect to what the prescriptive period is. And I think it's sufficient, and I think we've met that – met those requirements.

BY MR. NICKEL:

I'm not trying to mislead the Court or counsel about what the Act states, Your Honor. We cited cases that said that a cause of action does not accure until there is an [sic] ascertainable damages that has been caused with sufficient certainty by a given source. And our position is that, before the parties could sue Mr. Groner or before the [77] cause of action even came into existence, there had to e [sic] damages which were suffered with certainty as a result of Mr. Groner's conduct. And that's – we believe the evidence here indicates that that damage occurred

when there was an adverse ruling within the bankruptcy proceedings.

BY THE COURT:

Well, I don't think that's so. That's – that's simply when the bankruptcy judge made his ruling. But, to me, it should have been obvious beforehand that the basis for the ruling was there. And I don't think that's when the damages were sustained. That may have been when they became formalized or it became crystal clear or – or it was the date apparently of the dismissal of the action that the plaintiffs had against Hibernia. But I don't – I don't arrive at that same conclusion. But, to the extent that – that you need to protect the record, it's on the record.

Now, you know, appellate courts are very liberal on the question. So it may be y'all may succeed in taking it up. And certainly don't have any hesitation to, if you want to. You're not going to make me feel bad. If they feel differently, that's fine. The claim's not against me.

At any rate, if there's – one of y'all prepare a judgment. I guess – you've got two lawsuits here. Well, they're consolidated.

[78] BY MR. MINVIELLE:

They're consolidated now.

BY THE COURT:

So I guess you'll want to prepare it.

BY MR. BASS:

Yes, sir.

BY THE COURT:

Send it to counsel for approval as to form, or at least give them an opportunity to object to the form.

BY MR. BASS:

Thank you, Your Honor.

APPENDIX E – SENATE COMMITTEE ON JUDICIARY A, MINUTES OF MEETING OF JUNE 26, 1990

Chairman Bagneris called the meeting to order at 10:30 a.m., on Tuesday, June 26, 1990, in Senate Committee Room E of the State Capitol in Baton Rouge.

The secretary called the roll, and the following members were present:

Senator Bagneris, Chairman
Senator Foster, Vice Chairman
Senator Bares
Senator Fields
Senator Heinkel
Senator Nelson
Senator Swearingen

The following staff were present:

Jean L. Clyburn, Committee Attorney
Tom Tyler, Committee Professional
Lynda Middleton, Committee Secretary

The following witnesses were present:

Lucy McGough, Children's Code Project Committee, LSU Law School
Johnny Koch, Louisiana Dental Association
Carl Darbler, Louisiana Trial Lawyers Association
Katheryn Spaht, Louisiana State Law Institute
Catherine Smith, Independence, Louisiana
Larry Murrary, Louisiana Bankers Association
Mary Beth Arceneaux, Louisiana Bankers Association
Dr. David Smith, The Blood Center for Southeast Louisiana

Dr. Ralph Meier, The Blood Center for Southeast Louisiana
Harold Thomas, attorney, New Orleans, Louisiana

Senator Fields moved that the minutes for June 5, 1990, be adopted, and there being no opposition, the minutes were adopted.

House Bill 1338 by Representative Theriot

Senator Bagneris stated that he had been requested to handle this bill by Representative Theriot. He stated that this bill provides a one-year prescriptive period within which to file a malpractice action either against an accountant arising out of professional accounting services or against an attorney arising out of legal services, whether based in tort or breach of contract. One year is calculated from the date that the alleged act, omission, or neglect is discovered or should have been discovered, but the action must be brought no later than three years from the date of such occurrence. The action must not only be filed within this period, but it must be filed in a court of proper jurisdiction and venue. This prescription runs against all persons, including minors and interdicts. Because Louisiana is one of two states in the union to have a ten year prescriptive period, liability insurance is cost prohibitive. Carl Barbier of the Louisiana Trial Layers Association stated that he was not opposed to the bill as a whole, but would like an amendment to state that in the case of fraud, the peremptive period would not apply. Senator Bagneris offered an amendment to state this, and there being no opposition, the amendment was adopted. Senator Heinkel moved that the bill be

reported favorably as amended, and there being no opposition, the bill was so reported.